BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

TACOMA NEWS TRIBUNE, Appellant, v. State of Washington, DEPARTMENT OF ECOLOGY, Respondent.	)	PCHB No. 87-188 ORDER GRANTING APPELLANT'S SUMMARY JUDGMENT MOTION

This matter involves appellant Tacoma News Tribune's ("TNT") motion for summary judgment and dismissal, and respondent Department of Ecology's ("DOE") cross-motion for summary judgment, in PCHB No. 87-188. The motions address the issue of WAC 173-303-071-(3)'s exemption applicability. At the Board's request, the City of Tacoma filed an amicus brief.

Oral argument was held in Lacey, Washington on June 16, 1988. Present for the Board were: Judith A. Bendor (Presiding), Wick Dufford (Chairman), and Lawrence J. Faulk (Member). Attorney Thomas J. Newlon

of Perkins Coie, represented appellant TNT. Assistant Attorney General Jay J. Manning represented respondent DOE. City Attorney Robert Backstein represented amicus City of Tacoma.

We have considered the oral argument and the following filings:

1. Appellant TNT's Motion and Memorandum in Support with exhibits;
2. Respondent DOE's Cross Motion and Memorandum in Support with declarations and exhibits;
3. Appellant's Reply Memorandum with affidavit;
4. The City of Tacoma's Amicus Brief;
5. Appellant's Reply to Amicus;
6. The City of Tacoma's NPDES Permit No. WA-003708-7 and the City's Sewage Disposal Regulations (including the Industrial Wastewater Pretreatment Program).

From the foregoing filings, the Board determines that the following facts are not disputed:

UNDISPUTED FACTS

I

TNT publishes a daily newspaper at its plant in Tacoma, Washington. On October 26, 1986, a DOE employee conducted an inspection of the TNT plant. During the inspection he observed that several photographic processing machines were connected by hoses directly to the sanitary sewer system into which machines' wastes were being discharged. In the sewer system, the machines' wastes mixed

with other TNT domestic sewage. The combined wastes flowed by sewer line to the City of Tacoma publicly-owned primary sewage treatment plant ("treatment plant").

II

On November 26, 1986, DOE sent a letter to TNT stating that TNT is required to sample its' waste stream by December 31, 1986 and to provide a "waste stream designation" under Chapt. 173-303 WAC to DOE by January 31, 1987. The letter outlined other specific actions TNT had to undertake under the State hazardous waste regulations. An extension to submit designation test data until February 14, 1987 was subsequently granted.

III

On December 18, 1986 DOE returned to the plant and assisted in collecting waste samples. Test results sent to DOE on January 26, 1987 revealed that some of the wastes had the following chemical concentrations:

a. Photo lab fixer wastes contained 1510 parts per million ("ppm") of silver;

b. Loge fixer wastes contained 3,430 ppm silver; and

c. Loge developer wastes contained 500 ppm cadmium.

EP toxicity levels for extremely hazardous wastes are 500 ppm silver and 100 ppm cadmium.

Some time between December 18, 1986 and January 1, 1987 TNT

apparently stopped discharging its' photo processing wastes to the sanitary sewer. As of May 19, 1987, TNT had not provided all the designation test data outlined in the DOE November 1986 letter.

IV

On May 19, 1987, pursuant to RCW 70.105.080, DOE issued to TNT a Notice of Penalty Incurred and Due (No. DE 87-S146) for $6,000. The Notice alleged a violation of RCW 70.105.05, for failure inter alia to provide test data waste stream designation. TNT filed a timely appeal with this Board.

V

Prior to these events, on November 30, 1984, the United States Environmental Protection Agency had approved the City of Tacoma's Industrial Pretreatment Program, giving the City the authority to regulate industries which discharge to the City's sewer system.

The City's treatment plant's own discharges to waters of the state are regulated under its' NPDES permit's terms and conditions. The permit was issued by the State of Washington in 1985 pursuant to Chapt. 90.48 RCW and the federal Clean Water Act as amended, P.L. 95-217 (33 U.S.C. Sections 1251 et seq.).

At all times relevant, herein, the permit was in effect. The NPDES permit has a specific section, S.8.e., which deals with pretreatment, listing specific requirements at length. The permit requires the City to implement, enforce and obtain remedies for

discharges to its' system which fail to comply with the EPA approved Pretreatment Program and EPA promulgated General Pretreatment Regulations (40 C.F.R. Part 403). S.8.e.(3). The permittee is also required to annually file a report with DOE on its' pretreatment program, to include a list of industrial users inspected, those issued industrial waste discharge permits, and those industrial users not complying with federal, state, or local pretreatment standards. S.8.e.(5). Under the permit, DOE explicitly reserves the right to take corrective action against an industrial source and/or NPDES permittee. S.8.e.(3).

VI

The state regulation at issue, WAC 173-303-071, as it existed from October 1986 through May 1987, states in pertinent part:

> Excluded categories of waste.
> (1) Purpose. Certain categories of waste have been excluded from the requirements of chapter 173-303 WAC, except for WAC 173-303-050, because they generally are not dangerous waste, are regulated under other state and federal programs or are recycled in ways which do not threaten public health or the environment. WAC 173-303-071 describes these excluded categories of waste. [. . .]
> (3) Exclusions. The following categories of waste are excluded from the requirements of chatper 173-303 WAC, except for WAC 173-303-050;
> (a) Domestic sewage, and <u>any mixture of domestic sewage and other wastes</u> that passes through a sewer system to a publicy-owned treatment works (POTW) for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system; [. . .]
> (Emphasis added)

In June 1987, WAC 173-303-071(3)(a) was amended to read as follows:

> (3) Exclusions. The following categories of waste are excluded from the requirements of chapter 173-303 WAC, except for WAC 173-303-050:
>
> (a) Domestic sewage, and any mixture of domestic sewage and other wastes that passes through a sewer system to a publicy-owned treatment works (POTW) for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system. <u>This exclusion does not apply to the generation, treatment, recycling, or other management of dangerous wastes prior to discharge into the sanitary sewage system</u>. (Amendment underlined)

This amendment was <u>not</u> extant during the period in question.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these undisputed Facts the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over this appeal. Chapt 43.21B RCW

II

We conclude WAC 173-303-071(3), as extant between October 1986 and May 19, 1987, is clear and unambiguous. Under that regulation, TNT's photographic wastes were "other wastes" which were combined with domestic wastes which then flowed to the City's publicly-owned treatment works. Therefore, under the relevant regulation as it was in force then, these photographic wastes were exempt from regulation

under Chapt. 173-303 WAC.[1] Because we conclude the language is clear, we do not engage in statutory construction.

Furthermore, because the regulatory language is clear, we decline to engage in a hunt for legislative intent. The regulated community has a right to expect that clear regulations be enforced as written. To do otherwise in this instance would be to engage in statutory "leger de main" - sewer or otherwise.

While so concluding, we note that it is within DOE's authority to adopt a different regulation, if it choses to limit the exclusion, as it did in June 1987. In reaching this result, We conclude DOE was not left without enforcement alternatives. Chapt. 90.48 RCW and the City of Tacoma's NPDES permit provided alternate avenues for the Department.

III

DOE argues that to the extent WAC 173-303-071(3) conflicted in 1986-1987 with RCW 70.105.050, it was an invalid regulation and should be so declared by the Board. The Department further argues that the penalty was issued for a violation of RCW 70.105.050, and not the regulations, and therefore the penalty survives any invalidation of the regulation.

We conclude these arguments must fail. RCW 70.105.050 states in

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[1] Neither party has contended that WAC 173-303-050 applies, therefore we do not address that issue.

pertinent part:

> (1) No person shall dispose of designated extremely hazardous wastes at any disposal site in the state other than the disposal site established and approved for such purpose under provisions of this chapter, except when such wastes are going to a processing facility which will result in the waste being reclaimed, treated, detoxified, neutralized, or otherwise processed to remove its harmful properties or characteristics.

The purpose of the Chapt. 173-303 RCW hazardous waste regulations is to implement the statute. The regulations excluded combined wastes from the regulations' reach, including the designation requirement. Since alternative enforcement avenues existed then, we cannot conclude that RCW 173-303-071(3)'s exemption was invalid. Moreover, the statute itself employes the word "designated" extremely hazardous wastes. Every word of a statute is to be given meaning, if possible; none is surplusage. Unless "designation" was required, RCW 70.105.050 was not contravened. These DOE contentions must, therefore, also fail.

IV

DOE further contends that since TNT's wastes were untreated, such action does not constitute "all known, available, and reasonable methods of treatment," and the discharges were therefore illegal under Chapts. 90.48 and 90.54 RCW. See RCW 90.48.010 and RCW 90.54.020(3)(b). We decline to rule on that argument, as the Notice of Penalty solely alleges a violation of Chapt. 70.105 RCW. See, City of Marysville v. Puget Sount Air Pollution Control Authority, 104 Wn.2d 115, 702P.2d 459(1985)

ORDER

The Tacoma News Tribune's Motion for Summary Judgment is GRANTED, and Notice of Penalty No. DE-S146 is VACATED.

DONE this 23rd day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman

LAWRENCE J. FAULK, Member 6/23/88

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SYSTEM TWT TRANSPORTATION, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 87-212 ORDER GRANTING APPELLANT'S MOTION FOR SUMMARY JUDGMENT

This case involves the appeal of a hazardous waste generator fee in the amount of $3,000 assessed by the Department of Ecology (DOE) to System TWT Transportation. On September 8, 1987, System TWT appealed the assessment and it became PCHB No. 87-212.

On January 22, 1988, respondent DOE filed a Motion for Summary Judgment against System TWT Transportation, with an accompanying declaration, a memorandum and supporting material.

On February 29, 1988, System TWT Transportation filed its Motion for Summary Judgment against DOE, with accompanying affidavits and a memorandum.

On March 14, 1988, respondent DOE filed a responding Memorandum.

The motions came on for argument before the Board, Lawrence J. Faulk (Presiding) Wick Dufford, and Judith A. Bendor, on March 21, 1988. Terese Neu Richmond, Assistant Attorney General, represented respondent DOE. Lynda L. Brothers, Attorney at Law, represented appellant System TWT Transportation.

The Board has considered the arguments of counsel and the following materials from the record:

1) TWT letter appealing assessment, filed September 8, 1987
2) TWT letter amending appeal, filed December 14, 1987
3) Respondent's Motion for Summary Judgment, filed January 22, 1988
4) Memorandum in Support of Respondent's Motion for Summary Judgment
5) Declaration of Karen Michelena with Attachments (1) and (2)
6) Appellant's Motion for Summary Judgment, filed February 29, 1988
7) Memorandum in Opposition to WDOE Motion and In Support Appellant's Motion
8) Affidavit of Ted Rehwald
9) Second Affidavit of Ted Rehwald
10) Memorandum in Response to Appellant's Motion & In Response to Appellant's Memorandum in Opposition to Ecology's Motion

After considering the arguments, the submissions, and the files and records herein, the Board concludes as follows:

1. Respondent DOE was not prejudiced by appellant's raising new issues in its Motion for Summary Judgment and, indeed, responded thereto fully in advance of the hearing.

2. It is undisputed that the fee appealed herein is calculated in part on adjusted gross income attributable to business activities conducted outside the state. Therefore, as a matter of law, the fee is based upon an incorrect adjusted gross income, and therefore is in error. RCW 75.105A, WAC 173-305-030(2)(a). Cam Industries, Inc. v. DOE, PCHB No. 86-32 (1986).

We therefore GRANT Summary Judgment to appellant, and REMAND the matter to the Department to have the fee properly calculated in conformance with this Order.

In so doing, and to provide guidance for the future, we find appellant's other legal contentions under RCW 70.105A.030(1) [i.e. that 1) DOE failed to determine appellant TWT's major business purpose, and that 2) Appellant's business activities are exempt] to be without merit. We do not reach the issue of the applicability of the once a year generator fee reduction under WAC 173-305-040(b).

ORDER

NOW THEREFORE, respondent's Motion for Summary Judgment is denied and appellant's is GRANTED and the matter REMANDED to the Department for action in accordance with this Order.

SO ORDERED this 3d day of May, 1988.

POLLUTION CONTROL HEARINGS BOARD

5/3/88

LAWRENCE J. FAULK, Presiding

WICK DUFFORD, Chairman

JUDITH A. BENDOR, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF INTERMARK CONSTRUCTION, INC., dba INTERMARK CANDLEWOOD, LTD., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB NO. 87-213 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter concerns an appeal from two Notices of Violation and Civil Penalties of $1,000 each for emission of smoke and flyash from a landclearing operation, allegedly in violation of Puget Sound Air Pollution Control Agency (PSAPCA) Regulation I, Section 9.11(a). A formal hearing was held on December 14, 1987, in Seattle, Washington before the Pollution Control Hearings Board. Seated for and as the Board were Lawrence J. Faulk (Presiding), and Judith A. Bendor, Wick Dufford has reviewed the record. Respondent agency elected a formal hearing pursuant to RCW 43.21B.230. The hearing was officially reported by Lettie Hybrides of Evergreen Court Reporting.

Appellant Intermark Candlewood, Ltd., appeared and was represented by Steven Bankhead, project manager. Respondent public agency PSAPCA appeared and was represented by its attorney, Keith D. McGoffin.

Witnesses were sworn and testified. Exhibits were admitted and have been examined.

From the testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Respondent PSAPCA is an activated air pollution control authority under terms of the state's Clean Air Act, empowered to monitor and enforce outdoor burning in a five-county area of mid Puget Sound.

The agency, pursuant to RCW 43.21B.260, filed with this Board a certified copy of its Regulation I (and all amendments thereto), of which the Board takes notice.

II

Intermark Candlewood, Ltd., is the property owner of land located at 151st Avenue Southeast and Petrovitsky Road, in Renton, Washington. The land was being cleared of vegetation when the alleged violation occurred.

III

On June 16, 1987, at approximately 2:00 p.m., a citizen residing near the land-clearing site called PSAPCA and complained about smoke

from a landclearing fire which affected him at his residence.

At approximately 2:05 p.m., the PSAPCA inspector went to the complainant's home. The inspector observed two large outdoor fires, approximately 100 yards and 200 yards in a southerly direction from the residence on the Intermark Candlewood property.. The sky was clear, the weather was warm, and the winds were light coming from the south and the southwest.

IV

The inspector observed that both outdoor fires were emitting smoke, and that the odor was immediately evident. He rated the odor as distinct, definite and unpleasant. The inspector observed flyash from the fires being blown onto the exposed surfaces in the vicinity. The inspector's eyes began to water and sting and the inspector found it uncomfortable to breathe the smokey air.

V

The inspector rated the fire's odor at level 2, using the following scale:

0 - No detectable odor

1 - Odor barely detectable

2 - Odor distinct and definite, any unpleasant characteristics recognizable

3 - Odor strong enough to cause attempts at avoidance

4 - Odor overpowering, intolerable for any appreciable time.

This rating scale is used by PSAPCA not as a regulatory standard, but as a shorthand method for preserving impressions for evidentiary purposes.

The complainant made a sworn statement in which he stated that he was unable to open the windows or clear on the south side of his condominium during the burning because of the smoke, and that the smoke odor could be smelled inside even with the windows closed.

VI

The inspector drove to the landclearing fires where he took photographs of the burning and contacted Lewis Bankhead, Project Manager for appellant company. The inspector advised Mr. Bankhead that a Notice of Violation would be sent to his company for burning causing detriment to persons or property. On June 24, 1987, Notice of Violation No. 022056 was sent via certified mail.

VII

On June 24, 1987, at approximately 8:05 a.m. another citizen residing in the same Renten neighborhood called PSAPCA and complained about smoke from a landclearing fire which affected him at his residence. At approximately 9:00 a.m. the inspector made contact with the complainant at his residence.

The inspector observed that flyash was falling out on exposed surfaces and that the odor of smoke was present in the ambient air. A plainly visible residue of ash was noticed on lawn furniture and

decking and the residence itself. The complainent, by affidavit, described not only problems from ash outdoors, but from soot and smoke pentrating into the house and settling into clothing in the closet.

The inspector observed that the source of the smoke and the flyash were landclearing fires located three to six hundred yards north of the complainant's residence These were at the same site as the fires that were observed on June 16, 1987. The wind was coming from the north; the day was clear and warm.

During the cause of his investigation on June 24, 1987, the PSAPCA inspecotr also received complaints from other residents in the neighborhood, five of which later provided sworn statements regarding adverse effects they had suffered from the smoke and ash emanating from Intermark Cadlewwod's burning. They described a variety of problems including interference with use of their decks and lawns, soot on their outdoor furniture and cars, smoke inside and outside their houses, stinging eyes, sore throats, aversion to the smell. PSAPCA's inspector verified adverse effects at each of their residences.

VIII

After making observations at the various residences and taking photographs of his observations, PSAPCA's inspector, accompanied by the battalion chief for the local fire distrcit visited the burn site. (On June 23, 1988, over 100 residents of the neighborhood had petitioned the fire district to rescind Intermark Candlewood's

burning permit because of adverse effects they claimed were occuring at established homes in the area.) At the site, he observed six xmoldering piles of land clearing debris of various sizes, spread out over approximately one area.

The fire chief thereupon advised Intermark's representative that he was withdrawing its fir permit and a fire truck from the district proceeded to extinguish the burning.

In response to his observations on June 24, 1988, PSAPCA's inspector issued seven Notices of Violation (Numbers 022057, 022058, 022059, 022060, 022061, 022062, and 022063) via certified mail on July 6, 1987, each notice representing a separate address where his investigation had documented adverse affects.

IX

On August 21, 1987, respondent agency mailed Notices and Orders of Civil Penalties Nos. 6724 and 6725 (for $1,000 each) for allegedly violating Regulation I, Section 9.11(a) on June 16 and 24, 1987. Appellant received these civil penalties on August 24, 1987.

X

Feeling aggrieved by these actions appellant appealed to this Board on September 9, 1987. At the hearing, appellant company did not question legal liability. Appellant did contest the amount of the penalty, believing it to be excessive.

XI

PSAPCA allows landclearing burning within areas where the population density within .6 of a mile from the proposed burn site is less than 2,500 persons. Prior to the burning in question, the agency had issued a verification that the proposed site was in such an area. The verification document, however, explicity stated that it is unlawful for such burning to cause injury or unreasonable interference with life and property.

XII

Appellant stated that they had contracted with another firm to perform the actual burning of the vegetation. Appellant admitted that in fact damage had occurred. Appellant stated that burning could have been handled in such a way that the damage to enjoyment and property would not have occured. After they stopped burning, they did haul the debris to an approved disposal site. They also made some effort to provide for cleaning in and around the homes of citizens who were impacted by the smoke and flyash from the fires.

XIII

Any Conclusion of Law hereinafter determined to a Finding of Fact is hereby adopted as such.

From these Facts, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 70.94 and 43.21B RCW. The case arises under regulations implementing the Washington Clean Air Act, Chapter 70.94 RCW.

II

The Legislature of the State of Washington has enacted the following policy on outdoor fires:

> It is the policy of the state to achieve and maintain high levels of air quality and to this end to minimize to the greatest extent reasonably possible, the burning of outdoor fires. Consistent with this policy, the legislature declares that such fires should be allowed only on a limited basis under strict regulation and close control. RCW 70.94.740.

III

Under terms of Section 9.11(a) of PSAPCA Regulation, certain air emissions are prohibited:

> (a) It shall be unlawful for any person to cause or allow the emission of any air contaminant in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, of which unreasonably interferes with enjoyment of life and property.

This formulation parallels the definition of "air pollution" contained in the State Clean Air Act at RCW 70.94.030(2). The language is similar to the traditional definition of a nuisance. See RCW 7.48.010.

IV

On June 16 and 24, 1987, odors, smoke and flyash emanating from landclearing fires caused and allowed by appellant, traveled onto a nearby residential property so as to unreasonably interfere with enjoyment of life and property, in violation of PSAPCA Regulation I, Section 9.11(a).

V

Appellant is in a business which routinely engages in landclearing by burning. The company should be aware of the limitations on its conduct. Even landclearing burning, where otherwise allowed, RCW 70.94.750(2), must not cause the adverse effects forbidden by Regulation I, Section 9.11(a).

VI

Numerous complaints had been received by PSAPCA and the Fire Department about this multi-day landclearing fire. Only after the fire district revoked its burning permit did the appellant ultimately dispose of the vegetation by alternative methods. See RCW 70.94.745. However, it was too late. The flyash was already out of the fire. The damage was already done.

VII

PSAPCA's Regulation I, and the Washington State Clean Air Act provide for a maximum civil penalty of $1,000 per day for occurrences of this kind. The purpose of the civil penalty is not primarily

punitive, but rather to influence behavior. Considering all the facts and given the need to promote compliance among members of the public, a $2,000 monetary sanction is supported in this case.

Under all the facts and circumstances, we believe the penalties assessed here were reasonable.

VIIII

Any Finding of Fact hereinafter determined to be a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board makes this

ORDER

Notice and Order of Civil Penalty Nos. 6724 and 6725 are AFFIRMED.

DONE this 31st day of May, 1988.

POLLUTION CONTROL HEARINGS BOARD

5/31/88

LAWRENCE J. FAULK, Presiding

WICK DUFFORD, Chairman

JUDITH A. BENDOR, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

GERALD ADCOCK and LARRY McLANAHAN, Appellants, v. State of Washington, DEPARTMENT OF ECOLOGY, Respondent.	)	PCHB NO. 87-215 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case involves Gerald Adcock and Larry McLanahan's appeal of State of Washington Department of Ecology ("DOE") Order No. DE 87-C335 directing them "to effect repairs on the Benton City Mint Farms in Benton County, Washington. A hearing on the merits was held on April 5, 1988 in Wenatchee, Washington. Board Members present were Judith A. Bendor (Presiding) and Wick Dufford (Chairman). Attorney Donald W. Moore represented appellants. Assistant Attorney General Peter R. Anderson represented Department of Ecology. The hearing was tape recorded and a court reporter for Gene Barker & Associates recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. All Board Members having reviewed the record, the Board makes these

FINDINGS OF FACT

I

The Department of Ecology ("DOE") is a State of Washington regulatory agency empowered to administer and enforce the water resource laws of the state.

II

On March 15, 1977, Adcock Air Drilling contracted with O.B. Shaw, the property owner of Benton City Mint Farms ("Benton Farms"), to construct a well on his property in Benton County, Washington. Adcock Air Drilling is located in Lewiston, Idaho. Appellant well driller Larry McLanahan was a sub-contractor to Adcock Air Drilling on the well drilling. At the time in question, both appellants were licensed well drillers in the State of Washington. Neither Mr. Shaw nor Benton City Mint Farms, Inc. are named in Order No. DE 87-C355. No evidence was therefore presented on the feasibility of joining them as parties. Neither appeared as a witness.

III

The 1977 private contract contained many items. It did not specify a particular well casing requirement, but stated:

> 4. a. As required by Chapter 173-160 WAC, State of Washington, additional casing, packers, drive shoes

and cement will be installed below the surface pipe to guard against waste and contamination of ground water resources. If such work or materials are required, Owner shall bear the cost thereof, incuding pipe, cement, installation charges, as well as the footage price, as shown on Exhibit "A", with Owner to have the privilege of supplying to the site any and all necessary materials.

IV

On March 2, 1977, the DOE, recognizing the severe drought existing in Washington that year and its impact on reliable irrigation supplies, issued a temporary water rights permit to Benton City Mint Farms, Inc., for a well to be located at: 1350 feet north and 1200 feet west of the southwest (sic) corner of Section 27, within the NE 1/4 SE 1/4 of Section 27, Twp. 10N., Rge 26 E.W.M. in Benton County. (Exh. R-1)

In the temporary permit the well was to be 300 feet in depth. The temporary permit further stated in pertinent part:

> 6. Any well constructed under authority of this permit shall meet the minimum standards for construction and maintenance as provided under Chapter 18.104 RCW (Washington Water Well Construction Act of 1971) and Chapter 173-160 WAC (Minimum Standards for Construction and Maintenance of Water Wells).
>
> [. . .]
>
> 8. Upon completion of the construction and testing of the well, the attached water well report shall be immediately completed and forwarded to this office.
>
> 9. In the interests of affording a reasonable amount of protection for existing water rights and to minimize possible regulation against your well in favor of those rights, the following well construction provisions are deemed necessary to attain those goals:

This well shall be cased and effectively sealed through the first significant water bearing zone or to a depth of 250 feet, whichever is greater.

10. This temporary permit shall in no manner be construed to guarantee or even imply that a final (regular) permit will be issued under subject application. That determination will be made at a later date, probably after the termination of the 1977 irrigation season. Any investments made for withdrawal and distribution facilities are undertaken completely under your own responsibility, with the recognition that if the application is later rejected, the expenditure will be a one-time expense to save your crops during this drought season.

11. The temporary permit will remain in effect during the pendency of your application for permit when a final determination will be made and your request is either approved or denied, uness sooner revoked by the Director, Department of Ecology.

V

On February 28, 1978, DOE issued a Report of Examination (Exh. R-3) to Benton City Mint Farms, Inc., recommending appropriation for water diversion located at 700 feet north and 600 feet west of the southeast corner of Section 27, a location different on the Farm than the well authorized by the temporary permit. The report repeated the temporary permit's casing requirements.

The report further stated:

> Applicant is advised that notice of proof of appropriation of water (under which final certificate of water right issues) should not be filed until the permanent diversion facilities have been installed together with a mainline system capable of delivering the recommended quantity of water to an existing or proposed distribution system wihtin the area to be served.

The permit noted the existance of neighboring wells and stated that applicant may be required to regulate withdrawal or pumping "if existing rights are injuriously affected."

VI

On March 20, 1978, DOE issued to Benton City Mint Farms, Inc. a permit (G4-24606P; Exh. R-2) to appropriate water, with a priority date of February 10, 1977, with the location of diversion the same as in the Report of Examination. A copy was also provided and identified for the well drillers. This permit repeated the 300-foot well depth, and the requirements for well construction, Chpt. 18.104 RCW and Chpt. 173-160 WAC, and for a 250 foot minimum casing depth. The permit development schedule had an October 1, 1978 beginning date, with full use of water to be by October 1, 1980. There is no evidence currently before us that prior to the issuance of the DOE Order, the drillers received copies of either permit.

VII

Well construction was started by appellant McLanahan on July 7, 1978 and completed on September 11, 1978.

On September 27, 1978 Benton City Mint Farms, Inc., filed with DOE a Construction Notice for Ground Water Permit No. G-424606 (Exh. R-4) stating construction was completed in September 1978. It recited that the original well was "abandoned" because the driller lost tools in the well. Another one was drilled and Benton Farms certified that the

actual construction was done in accordance with the terms of that permit. The Notice also stated:

> "We have advised Adcock Air Drilling [. . .] to send well log to your office."

VIII

On February 28, 1980, DOE issued a Certificate of Water Rights to Benton City Mint Farms for the well (Exh. R-5). The Certificate provisions stated in part that all wells shall meet the water well construction and maintenance minimum standards of RCW 18.104 and Chpt. 173-160 WAC.

IX

DOE did not receive the well log until August 6, 1987. The log, signed by appellant McLanahan on September 31, 1978, shows on its face that the well was cased only from 0 to 135 feet, and then from 387 feet to 460 feet. According to the log, the static water level when the well was completed in September 1978 was 119 feet. At the hearing, appellants stated that at the time the well was drilled, they did not know of the existence of the State-required 250 foot minimum casing requirement.

X

At some point in time a dispute arose, (and may still exist), between appellants and Benton Farms regarding payment for the well's construction. Appellant McLanahan testifed that he intentionally did

not submit the well log to the DOE, hoping to use the withholding to promote settlement of the payment dispute.

XI

On November 18, 1986, DOE staff visited the well. It was Departmental practice at that time to gather ground water monitoring data when possible in areas where data was lacking. To that end, the staffer opened the Benton Farms well and heard sounds he ascertained were typical of cascading water. The staffer was trained to recognize such sounds. Subsequent tests revealed significant volumes of cascading water entering the well at an uncased portion of the well, at approximately 127 to 140 feet. There has been a decline of water level over the years, the present static level in the well being about 202 feet.

XIII

Cascading water is the movement of water from an aquifer above the static level into the well, resulting in the transfer of ground waters between aquifers. It is a cause for alarm here where there are nearby shallow artesian wells in the area that can be injuriously affected by such transfer. Evidence indicated some possible adverse effect on a local well, one that had been surface artesian prior to the operation of this well, but subsequently showed a drop in water level to approximately 60 to 65 feet.

There is no evidence currently on the record that appellant well drillers knew, at time the wells were drilled, that cascading water was

occuring. Any entry of water between 127 and 140 feet at that time would have been below the static level at the time of construction. We also note that the certificate was issued in early 1980. The record does not disclose why the cascading water was not discovered before then by DOE, in inspectng to confirm the proof of appropriation. See RCW 90.03.330.

XIV

On April 2, 1987, DOE issued Notice of Violation No. DE 87-C183 to Gerald Adcock. Order DE 87-C355 was issued on August 13, 1987 to both Mssrs. Adcock and McLanahan, alleging violations of WAC 173-160-110, Chpt. 18.104 RCW, and RCW 90.44.110, and ordering remedial action to repair the well. This Order resulting in an appeal being filed with this Board on September 14, 1987.

XV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and this appeal pursuant to Chapter 18.104 and 43.21RCW.

II

The Department's regulatory order (No. DE 87-C355) specified that WAC 173-160-110 was being violated. That section states in part:

> In developing, redeveloping or conditioning a well, care shall be taken to preserve the natural barriers to ground water movement between aquifers and to seal aquifers or strata penetrated during drilling operations which might impair water quality or result in cascading water. [. . .]

III

The Department has the authority to condition any permit issued pursuant to an application for constructing a ground water well, to specify an approved type and manner of construction for the purpose of preventing waste of public waters and preserving their head. RCW 90.44.060.

Under RCW 90.44.110 the Department shall require wells to be so constructed and maintained as to prevent waste and has the authority to specify the manner of construction adequate to achieve that purpose.

We conclude that the Department acted well within its lawful authority in conditioning the permits, includng the casing requirement.

IV

Moreover, this well could not be lawfully constructed unless the application for water appropriation had been filed and the permit was granted. WAC 173-160-040. Minimum Standards for Construction and Maintenance of Water Wells. This requirement has been in effect since at least 1973, and applies herein. The permit was granted and it contained among other conditions a minimum casing requirement.

V

The appellant well drillers were licensed and as such are required to have knowledge of the water well construction and maintenance regulatory standards, including the requirement for a permit to appropriate. There is, however, no evidence currently before us that they actually saw the permits, or knew their particular conditions until just before this hearing.

VI

We conclude that the doctrine of laches cannot be applied against the Department by these appellants. The sub-contractor intentionally did not submit the required well log to DOE. With such unclean hands, an equitable doctrine cannot be applied. See, Port of Walla v. Sun-Glo, 8 Wn.App. 51, 504 P.2d 324, citing Portion Pack, Inc. v. Rond, 44 Wn.2d 161, 265 P.2d 1045 (1954).

VII

Nine years have passed from the time the well was drilled until DOE issued the Order. Seven years have passed since the water was to be put to full use, as specified by the permit to appropriate. With the passage of time, memories may dim, evidence may become stale, and contractural rights may attenuate. Given the length of time in this case, we decline at this time to apply Ponderosa Drilling and Development, Inc. v. DOE, PCHB No. 85-212.

VIII

DOE has argued, citing WAC 173-160-040 and -110, that it was a matter of its enforcement discretion whether to name in the Order only the well drillers, or the property owner, or all of them. We observe that the Order, if enforced solely as to the well drillers, would necessitate the improvement of a well on the property of another. There has been no showing, to date, that DOE could not feasibly join the property owner in its enforcement action. See, Civil Rule 19(a). Under the facts so far in this record and to promote the integrity of the judicial fact-finding process, we conclude that the property owner is a party to be joined. WAC 371-08-031; Civil Rule 19. Given the gaps in the factual record before us, we decline to rule on the issue whether the property owner might be an indispensable party. See, Department of Social and Health Services v. Latta, 92 Wn.2d 812, 601 P.2d 520 Such an issue would also benefit from briefing and further argument.

IX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law the Board enters this

ORDER

Order DE 87-C353 is STAYED, and this appeal is REMANDED to the Department of Ecology for actions consistent with this Order.

SO ORDERED, this 2nd day of May, 1988.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman

LAWRENCE J. FAULK, Member 5/2/88

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

W-I FORESTRY PRODUCTS, L.P., a LIMITED PARTNERSHIP, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 87-218 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a cease and desist order relating to the diversion of water from Brender Creek in Chelan County, came on for hearing before the Board, Wick Dufford (presiding) and Judith A. Bendor, on April 5, 1988, at Yakima, Washington.

Corinna D. Ripfel-Harn appeared as attorney for appellant W-I Forest Products. Peter R. Anderson, Assistant Attorney General, represented respondent, Department of Ecology. The proceedings were reporter by Malinda Avery of Jackie Adkins & Associates.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Appellant W-I Forest Products operates a lumber mill in Cashmere, Washington. Brender Creek, a tributary to the Wenatchee River, flows along part of the mill property boundary. The Wenatchee River runs nearby, separated from the mill by a railroad right-of-way.

II

Respondent Department of Ecology is a state agency empowered to administer and enforce the water resource laws of the state.

III

The lumber mill is reputed to be the oldest in continuous operation between Seattle and Spokane. For more than 70 years water has been diverted from Brender Creek for the mill's operations.

In 1966 the state issued a certificate of water right (priority 1964) for the mill, evidencing a second appropriation directly from the Wenatchee River of "2.0 cubic feet per second for industrial use".

IV

On September 10, 1987, a water resources inspector for Ecology posted a Notice of State Regulation at W-I Forest Products ordering the mill to "cease and desist diversion of water from Brender Creek

until you obtain water right permit authorization."

V

On September 16, 1987, W-I Forest Products filed an appeal of the posting with this Board, asking for a stay of the order to cease and desist diversion. On September 23, 1987, the Board heard the motion for stay and, thereafter, granted the same through the end of October 1987. Subsequent efforts at a negotiated resolution did not succeed and thus, the matter came on for hearing on the merits on April 5, 1988.

VI

The mill was built at its present site in the early part of this century by the Schmitten Lumber Company, a family concern which ran the business until the mid-1970's when it was sold to Pack River Lumber Company. Thereafter, the business was acquired by W-I Forest Products.

VII

Historically, water from Brender Creek has been used in the mill's boilers for saw and pump cooling, for dust control and to keep the logs wet. A log pond was maintained on the site until some time in the early 1970's when it was eliminated and the company converted to a log sprinkling operation.

VIII

At present, the mill property contains at least five acres of log

decks, where the logs are temporarily stored before being fed into the mill and converted to boards. The conversion process involves debarking, sawing into rough lumber, drying and then planing to produce the finished product.

An extensive sprinkling system has been installed for the log decks, both as a fire protection measure and to prevent the logs from drying prematurely. If not keep wet, white fir and hemlock logs will often split in the mechanical debarker and be ruined for further milling.

IX

Water for the sprinkler system is now pumped from Brender Creek. The diversion from the Wenatchee River is currently used in the mill proper, principally for steam for the drying kilns.

The Wenatchee diversion could be modified physically to encompass the log sprinkling function, but the plumbing for this kind of operation has not been installed.

X

The Brender Creek diversion, though initiated long ago, is not itself the subject of an appropriation permit or certificate issued by the state. There is no evidence that this use has ever been confirmed as a right in a general adjudication.

Moreover, no statement of claim asserting a right to divert from

Brender Creek for the mill was filed pursuant to the claims registration statute, Chapter 90.14 RCW.[1/]

XI

Schmitten Lumber Company applied to the state for permission to initiate the diversion from the Wenatchee River in 1964 under the rubric "industrial use". In answer to a questions about other water rights appurtenant to the property, the application stated: "Brender Creek water by right of use prior to 1917."

The Report of Examination for the Wenatchee diversion (written in 1964), recommended issuance of a permit and stated that "the water requirement for operation of a sawmill and steam boilers is calculated on a continuous diversion of 2.0 c.f.s."

The Report dealt with the Brender Creek diversion as follows:

> Applicant has used water from Brender Creek for many years, this source however has become undesirable because of the quality of the water as well as an insufficient amount during low flow periods. Applicant intends to maintain only emergency standby facilities from Brender Creek. Permit shall be subject to the following special provisions: "Issued as a supplemental supply to a vested claim to water right from Brender Creek, the total amount annual diversion shall not exceed 1440 acre-feet from both sources."

[1/] The claims registration statute established a five year period, with June 20, 1974 as the deadline for filing claims. RCW 70.94.041 Subsequently, filing was reopened briefly in 1979 and 1985. Section 4, Chapter 216, Laws of 1979, ex. sess.; Section 1, chapter 435, Laws of 1985. Neither W-I Forest Products nor its predecessors filed a claim for the Brender Creek diversion during any of these filing periods.

A permit for the Wenatchee diversion was issued as a supplemental right, consistent with the examiner's recommendation. In 1966 upon proof of appropriation, a certificate (SWC No. 9658) was issued, subject to the conditions set forth in the permit.

XII

Seventeen years later, in 1983, Ecology adopted chapter 173-545 WAC, the Instream Resources Protection Program, Wenatchee River Basin. By this act, minimum instream flows were established for the Wenatchee River. The effect was to make all future consumptive water right permits issued for diversion of surface water from the main stem of the Wenatchee and perennial tributaries subject to the instream flows. WAC 173-545-030(4).

Brender Creek is a perennial tributary. Thus, a new permit to appropriate water from the mill's present creek diversion site would call for diversions to cease when water in the river was at or below the specified minimum, as measured at the appropriate gage.

XIII

In 1986, while in the area, Ecology's inspector noted the mill's pump on the creek. In June of 1987, the inspector wrote to W-I Forest Products, Inc., inquiring about rights for the diversion. On July 24, 1987, the inspector followed up with a detailed letter, advising that his searches of the state's records ~~showed~~ disclosed no permit or certificate for the mill to divert from the Creek.

The letter stated in part:

> From my research, I conclude that Schmitten Lumber Company may once have enjoyed a vested water right for the Brender Creek pump location, but that such vested right was forfeited when Schmitten Lumber Company or its successor(s) failed to file a water right claim form with the state as required by Chapter 90.14 of the Revised Code of Washington. (RCW).

In reference to the certificate for diversion from the Wenatchee River, the letter stated:

> This certificate was issued as supplemental to the undocumented Brender Creek vested water right. Since the Brender Creek right has apparently relinquished, Surface Water Certificate No. 9658 has now become the primary water right.

XIV

In response to Ecology's letter, W-I Forest Products, in August 1987, applied to the agency for a new permit for the Brender Creek diversion. This record does not show that the matter has been ruled upon by Ecology.

XV

The posting performed on September 10, 1987, was the outgrowth of a complaint by a Brender Creek diverter downstream of the mill, whose appropriation is recent and, therefore, subject to interruption when minimum flows are reached.

At that time, the river was below the minimums and such recent

diversions had been shut down. In these circumstances, the complaint asserted that W-I Forest Products was continuing to divert without any authority to do so.

XVI

In this appeal, W-I Forest Products asserts the validity of its historical diversion from Brender Creek and argues that, in fairness, the state cannot properly maintain the contrary. This position, if sustained, would allow the continuation of the diversion free of interruption at times of minimum flow in the river.

We are not asked here to determine if Ecology may allow W-I Forestry Products to move the point of diversion for the Wenatchee River right to Brender Creek or whether the use of the Wenatchee River right can encompass all the uses, including log sprinkling, made of water at the site. We note, however, that the total amount allocated under the certificate (SWC No. 9658) is more than that needed for boiler and other in-mill operations alone. We are also convinced that log sprinkling is encompassed within the "industrial use" category.

XVII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to the following

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these parties and these matters.

Chapters 90.03, 90.14 and 43.21B RCW.

II

The question before the Board is a narrow one: Should Ecology's action in ordering W-I Forest Products to cease and desist from diverting water from Brender Creek on September 10, 1987, be sustained?

III

In regulating water use, Ecology is not empowered to adjudicate existing rights but must, nonetheless, make tentative determinations about the validity of such rights. See Funk v. Barthalet, 157 Wash. 584, 289 P.2d 1018 (1930); Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

The tentative determination made here was that no valid right exists in W-I Forest Products to divert water directly from Brender Creek. The basis for this determination was that, absent a state-issued permit or certificate, the legitimacy of a historical use is preserved only by having on file a claim of right made pursuant to RCW 90.14.041. No such claim is on file for the Brender Creek diversion.

IV

Under RCW 90.14.071 any person who claims a diversionary right (not evidenced by a state-issued permit or certificate) but who fails to file a statement of claim for such right "shall be conclusively

deemed to have waived and relinquished any right, title, or interest in said right." (emphasis added).

This statutory language leaves no room for construction. The failure to file means the loss of any right which might have existed.

We conclude, therefore, that Ecology's tentative determination must be upheld. Further we hold that the cease and desist order, under the circumstances, should be affirmed.

V

W-I Forest Products argues that the information provided to Ecology in connection with its 1964 application for diversion from the Wenatchee River constitutes substantial compliance with the claims registration statute as to the Brender Creek diversion, citing Department of Ecology v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1985).

We agree that the information then submitted contains much of the information required by RCW 90.14.051 for a statement of claim. We further agree that the general statutory purpose "to cause a return to the state of any water rights no longer exercised" (RCW 90.14.010) is not served by terminating the Brender Creek diversion.

However, despite the equities, we are not at liberty to rewrite the plain and explicit language of the statute.

Adsit is readily distinguishable from the instant case. In Adsit the claimant had filed a document (on the wrong form, but substantially complying with the claims statute) during the statutory

1969-74 filing period. Here the assertion is that documents lodged with the state years before the claims statute was even enacted constitute substantial compliance.

We cannot accept this argument. The water resources files of the state which predate the claims statute are without doubt, full of passing references to claimed rights, not otherwise officially documented. To conclude that such references, if sufficiently descriptive, constitute compliance with a later enacted statute, would be largely to nullify the effect of that statute. Without a filing during the prescribed registration period, Ecology's records simply do not disclose whether a claim asserted in 1964 was still being asserted in 1974.

As pointed out in Adsit, quoting Texaco, Inc. v. Short, 454 U.S. 516, 526 (1982):

> "just as a State may create a property interest, . . . , the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest." 103 Wn.2d at 707.

Here the problem is that no claimant expressed the intention to retain the interest during the time statutorily provided for that purpose.

VI

W-I Forest Products further argues that Ecology is estopped to deny the existence of a right to divert from Brender Creek. Again,

this position cannot be accepted because it was the Legislature, not Ecology, which enacted the claims statute. Chapter 233, Laws of 1967, substantially amended by Chapter 284, Laws of 1969.

Ecology evidently did recognize the validity of the Brender Creek diversion in 1964. What caused the agency to change its position in 1987 was the intervening act of the Legislature which created a new legal requirement that was not met.

In a proper case, Ecology may be estopped to repudiate its prior position. But the Legislature is not estopped from adding to the law.

VII

Additionally, W-I Forest Products maintains that the posting process, by which an order to cease and desist is entered without a prior hearing, is a violation of due process of law.

This is a constitutional issue over which this Board has no jurisdiction. Yakima County Clean Air Authority v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1975).

We do observe, however, that the transitory nature of water, the complexity of the priority system and the variability of supply and demand, have traditionally been viewed as presenting emergent circumstances, placing water resources enforcement in a category akin to health and safety codes, requiring immediate action prior to hearing. See, e.g., State v. Lawrence, 165 Wash. 508, 6 P.2d 363 (1931).

VIII

Finally, we agree with Ecology's analysis that the Wenatchee River right does not in any sense embody the older Brender Creek right. When no claim to the Brender Creek diversion was filed, that right was relinquished. The Wenatchee River diversion, initially defined as a supplemental right, then became a primary right, because of the failure of the condition which initially limited its scope. But it remained a separate and distinct entitlement with its own separate priority and attributes.

The Wenatchee River right has never included any place of diversion other than the Wenatchee River as described on its certificate. When the Brender Creek right ceased to exist, the Wenatchee River right did not somehow expand to include the old right's features. See generally, Schuh v. Department of Ecology, 100 Wn.2d 180, 667 P.2d 64 (1983).

Accordingly, the Brender Creek right was not exempt from filing as a claim by virture of being "based on the authority of a permit or certificate" issued by the State. RCW 90.14.041.

IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters the following

ORDER

The cease and desist order posted by the Department of Ecology on the September 10, 1987, at W-I Forest Products' Brender Creek diversion is affirmed.

DONE this 5th day of October, 1988.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Presiding

Judith A. Bendor
JUDITH A. BENDOR, Member